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No. 88-1595

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR,
and BARBARA K. CLISBY,
Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents have not raised one valid reason why this Court should not grant review in this case.

A. The Remand Order Of The Court Of Appeals Does Not Prevent Review By This Court.

The fact that the Court of Appeals remanded the case to the district court to calculate interest poses no obstacle to review by this Court.[1]

Respondents concede that this Court has jurisdiction. Resp. Brief at 2. Moreover, review of the Court of Appeals' order — even if it were arguably not final — would be appropriate for the same reasons it was appropriate in *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In *General Motors*, the Court of Appeals reversed a compensation judgment in a condemnation proceeding by the United States and remanded the cause for determination of the appropriate compensation pursuant to a different formula than used by the district court. Despite the fact that the amount of the compensation remained to be calculated under the new formula, this Court noted the conflict among the circuits and explained: "*We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case.*" (Emphasis added). *See Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916) (when conflict exists among lower federal courts, review of non-final judgment is appropriate).

Likewise here, where a direct conflict exists among the circuits, and where a ruling of non-retroactivity would completely eliminate the need for any further

1. Respondents misleadingly state that the Court of Appeals has remanded "a major issue" to the district court. Resp. Brief at 11. On the contrary, while a large sum of money hinges on the result of the determination by the district court, the legal issue is extremely circumscribed and requires the district court simply to choose between two T-bill interest rates.

proceedings, this Court should exercise its jurisdiction to review the erroneous decision of the Court of Appeals.

B. The Retroactivity Holding Of The Court Of Appeals And This Court's Resolution Of That Issue Has Significant And Far-reaching Implications.

Contrary to respondents' suggestion, the issue of whether amended § 1961 applies to judgments entered prior to its effective date is a live issue. Indeed, within *the last two weeks* another court of appeals addressed the issue and concluded, contrary to the Court of Appeals in this case, that amended § 1961 is *not* to be applied retroactively. *See Evans v. City of Chicago*, Nos. 87-3006, 87-3085, Slip. op. (7th Cir. April 27, 1989).

Respondents wrongly suggest that the only cases subject to the decision of the Court of Appeals and to a decision by this Court on the retroactive effect of amended § 1961 are cases considered "open" by the Clerk's office of the Eastern District of Pennsylvania. Respondents do not explain how they derived their list of "open" cases in the district court, but it is clear that this is a meaningless statistic. The Eastern District of Pennsylvania Clerk's Office ordinarily considers a case "closed" *when judgment is entered in the district court*, regardless of the appellate status of the case.

Kaiser has identified the class of cases potentially subject to the retroactivity holding of the Court of Appeals: judgments entered prior to October 1, 1982 which have not been satisfied. Any judgment creditor holding a pre-amendment unsatisfied judgment that petitions the district court with respect to allowance of postjudgment interest, may receive "open" status in the clerk's office once more. Respondents' reliance on any compilation of currently "open" cases solely in the Eastern District of Pennsylvania to determine which

cases would be subject to the decision of this Court or the Court of Appeals is misplaced.[2]

The Court of Appeals' decision in this case would require courts to apply amended § 1961 to any case where the calculation of the amount of postjudgment interest has remained unresolved up to this time, and is hereafter put into issue by one of the parties. *See Bradley*, 416 U.S. 696, 710 (1974); *Campbell v. United States*, 809 F.2d 563, 569 (9th Cir. 1987). A decision by this Court would affect this category of cases throughout the nation. The issue remains a significant one, the implications of which are not confined to the Third Circuit. Each of the pre-amendment judgments which have not been marked satisfied may carry postjudgment interest. Unless the district court ruled in advance on the appropriate rate of postjudgment interest, which is highly unlikely, each of the thousands of "unsatisfied" pre-amendment judgments in the Eastern District of Pennsylvania, as well as the tens of thousands of pre-amendment unsatisfied judgments in other district courts throughout the nation, may give rise to further proceedings, just like these, in which the district court will address the appropriate calculation of postjudgment interest.

Respondents have not refuted Kaiser's showing that a decision by this Court on the issue of the retroactive application of amended § 1961 would affect a substantial number of interest calculations upon which turn hundreds of millions of dollars in postjudgment interest.

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2. Respondents have not argued in favor of another potential interpretation which would apply the *Bradley* analysis only to cases in which the *merits* of the underlying action were pending on appeal on or before October 1, 1982, the effective date of amended § 1961. To determine the volume of these cases would require a review of all of the docket sheets, both in the district courts and in the courts of appeals, in the cases in which there are judgments which have not been marked satisfied, to determine if an appeal *on the merits* had lasted beyond October 1, 1982.

C. The Circuits Are In Direct Conflict On The Issues Presented By Kaiser's Petition.

Respondents incorrectly suggest that there is no conflict among the circuits on whether amended § 1961 applies to a judgment entered prior to its effective date. They reason that no conflict can occur because the question of possible "manifest injustice" resulting from retroactive application must be decided on a case-by-case basis and, therefore, any decision on the question has no precedential value.[3] The fallacy in respondents' position is easily exposed.

First, the case-by-case approach suggested by respondents stems only from the "manifest injustice" exception to the *Bradley* rule, which is simply one of three exceptions. Putting "manifest injustice" aside, Kaiser has demonstrated that there is a direct conflict among the circuits with respect to the applicability of the other two exceptions (i.e., whether either the language of the statute, or its legislative history, or both, provide a fair indication that it should be construed to apply prospectively only). Neither of these exceptions is linked to the facts of any particular case. Kaiser Petition at 10-11.

3. Respondents attempt to distinguish on its facts the conflicting decision by the court in *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2nd Cir. 1984), a case identical in all pertinent respects to this case. They argue that unlike *Litton*, this case involves "vicious predatory conduct which is a classic treble damage case." Resp. Brief at 18. While Kaiser has not quibbled with respondents' continuous vituperative characterizations of its conduct, this Court should note that the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division filed a brief at the request of this Court in which they argued against certiorari on the underlying merits of this case on the ground that the liability finding was so wrong that it would never be followed: "we would have grave doubts that the evidence suffices to sustain a verdict under Section 2 because Kaiser's conduct may well be characterized as no more than aggressive competition." U.S. Amicus Curiae Brief, at 17-18.

Furthermore, if *Bradley* requires a case-specific analysis to determine the retroactivity of amended § 1961, as the Court of Appeals decision suggests, it plainly illustrates the need for review and reversal by this Court. There is no dispute that in amending § 1961, Congress intended to promote a goal of *uniformity* in calculating postjudgment interest on judgments obtained in federal courts. Yet the Court of Appeals' decision may require a far more individualized determination of the appropriate interest rate than the statute required prior to its amendment. This Court should not permit such a perversion of Congress' intent in amending § 1961.[4]

D. The Presumption Against Retroactive Application Of Statutes Applies Here And The Issue Is Properly Before This Court.

Kaiser has properly raised the issue of whether the analysis prescribed by *Bradley v. School Board*, 416 U.S. 696 (1974), applies to this case. Respondents wrongly suggest that Kaiser is precluded from advancing this argument because it failed to raise it until its Petition for Rehearing before the Court of Appeals, filed on January 23, 1989. However, Kaiser's argument rests on this Court's decision in *Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988) — *a decision rendered after all briefing and after oral argument before the Court of Appeals in this case.* Kaiser raised this argument at the first opportunity. The issue is properly before this Court.[5]

4. Respondents argue that, under *Bradley*, the retroactive application of a statute *always* may differ from case to case. Assuming this is a correct reading of *Bradley*, this Court's implicit, wholesale rejection of the *Bradley* approach in *Georgetown* was well-founded.

5. Even if Kaiser had a prior opportunity to raise this issue and failed to do so — which is not the case — this Court may nevertheless entertain Kaiser's argument. *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 467 n.16 (1987); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980).

Respondents wrongly attempt to explain away the unequivocal presumption *against* retroactive application of statutes announced in *Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988), on the ground that it simply "prohibit[s] retroactive application of statutes to defeat vested property rights. . . ." Resp. Brief at 25. Respondents confuse statutory interpretation with constitutional requirements of due process. *See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936). When retroactive application of a statute defeats "vested property rights", it is prohibited by the Constitution. The constitutional prohibition bears no relation to the rule of statutory construction which simply provides the framework for proper interpretation of a statute silent on the issue of retroactivity. *Id.* Justice Scalia, concurring in *Georgetown*, recognized this critical distinction. *See Georgetown*, 109 S. Ct. at 479.

Moreover, this Court in *Georgetown* relied on *Greene v. United States*, 376 U.S. 149 (1964), and *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), for the general presumption *against* retroactivity. Neither of those decisions turned on whether the rights involved were "vested property rights". In fact, the *Magnolia* case dealt with retroactive application of a change in an interest rate — the exact situation which respondents contend does not implicate vested property rights.

E. There Is A Direct Conflict Among The Circuits As To The Date From Which Interest Begins To Accrue And The Issue Is Properly Before This Court.

The Third Circuit's holding that postjudgment interest *must* commence on the date of the damage *verdict* conflicts with all other circuit courts of appeals to have addressed this issue. Contrary to the argument in respondents' brief, the Third Circuit in this case did not

adopt a discretionary approach which *allows* postjudgment interest to accrue from the date of the verdict when an "inordinate" delay renders it inequitable to measure from the date of the judgment. Rather, the Third Circuit's decision *requires* postjudgment interest "calculated from the date of the damage verdict underlying the appropriate judgment." Kaiser Petition at A-14. It thereby conflicts *both* with the decisions in circuits which have adopted the "equitable construction" approach and with the position of the Court of Appeals for the District of Columbia Circuit which refuses to calculate interest from a date other than the date of "judgment". *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614, 616-18 (D.C. Cir. 1980).

Kaiser's argument that the Court of Appeals chose the incorrect date to begin the accrual of postjudgment interest is properly before this Court. Before the district court, Kaiser argued that interest should run from July 1, 1986. Kaiser Petition at A-38 through A-39. Before the Third Circuit, Kaiser preserved its position that the district court had wrongly chosen to measure the accrual of interest from December 2, 1981 and should have measured interest from July 1, 1986.[6]

In addition, contrary to respondent's suggestion at page 12, n.7 of their brief, Kaiser has remained entirely consistent with respect to the appropriate interest rate. It has maintained throughout these postjudgment interest proceedings that if the judgment from which interest was measured fell prior to the effective date of amended § 1961, the prior version should govern the calculation of interest. If the Court determined that interest ran

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6. Kaiser correctly predicted, however, that the Court would consider itself constrained by its prior holding in *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3rd Cir. 1987), to measure interest from the date of the damage verdict underlying the judgment.

from a date *after* the effective date of amended 1961, Kaiser has always maintained that the amended version should apply.

F. The Decision Of The Court Of Appeals Was Wrong.

Respondents argue that the Third Circuit's decision was correct and, therefore, review should be denied. In fact, the Third Circuit was wrong in (1) applying the *Bradley* analysis at all; (2) failing to recognize that both the language and legislative history of amended § 1961 show that Congress intended it to apply prospectively only; (3) failing to recognize the manifest injustice in applying amended § 1961 to the December 4, 1981 judgment in this case; and (4) choosing December 2, 1981 as the appropriate "judgment" date from which to begin the accrual of postjudgment interest.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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